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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 12 2003

In the Matter of

Amendment of Section 73.622(b),
Table of Allotments,
Digital Television Broadcast Stations
(Fort Myers, Florida)

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MM Docket No. 00-180
RM-9956

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Video Division
Media Bureau

COX BROADCASTING, INC.
REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Cox Broadcasting, Inc. ("Cox"), parent company of the licensee of WFTV(TV) (Orlando, Florida), by its attorneys and pursuant to Section 1.429 of the Commission's rules,¹ hereby files this Reply to the Opposition ("Opposition") of Fort Myers Broadcasting Company ("FMBC") to Cox's Petition for Reconsideration ("Petition") of the unconditional channel change for WINK-DT (Ft. Myers, Florida) as authorized by the Commission's **Report and Order ("Order")** in the above-captioned proceeding.² In its Petition, Cox requested that the Commission reconsider unconditional grant of the channel change because, *inter alia*, of the likelihood that viewers of station WFTV(TV) would receive interference in excess of that predicted.

In the **Order**, the Commission did not respond explicitly or meaningfully to Cox's request that conditions be placed on the grant of FMBC's requested channel change, and there is no evidence that the Commission considered the request when making its decision. Because the Commission is charged with the responsibility to make a "consideration of all relevant factors"

¹ 47 C.F.R. § 1.429(2001)

² Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Fort Myers, Florida), **Report and Order**, MM Docket No. 00-180, **DA** 02-3154 (rel. Nov. 20,

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in its decisionmaking,³ Cox stated in the Petition that the Commission should reconsider its unconditional grant and state with particularity the actions it would take if actual interference exceeds the *de minimis* levels predicted.

The Opposition argues that because computer analysis of the proposed channel substitution predicts that less than *de minimis* levels of interference would be created, the Commission does not have the discretion to impose conditions.⁴ FMBC, however, overstates the case. The Commission has implied in the past that it would entertain placing conditions on amendments to the DTV Table regarding resolution of actual interference problems. Where a party requesting a DTV channel substitution explicitly had agreed to negotiate with an opposing party in the event interference problems occurred, the Commission said in such instances it was unnecessary to condition a grant.⁵ The action suggests that the Commission believed it had discretion to impose such conditions on amendments of the DTV Table and was indeed prepared to exercise such discretion even though the channel change proposal had initially passed technical muster. Moreover, the Commission has exercised its discretion to impose conditions on amendments to the DTV Table when contemplating approval of foreign countries, so there is

2002); 68 Fed. Reg. 7114 (Feb. 12, 2003). FMBC served its Opposition via first-class mail. Accordingly, this reply is timely filed. *See* 47 C.F.R. § 1.429(g), 1.4(b) (2001).

³ *Damsky v. FCC*, 199 F.3d 527, 533 (D.C. Cir. 2000) (*citations omitted*); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (holding that courts reviewing agency action under the arbitrary and capricious standard must make a “searching and careful” examination of “whether the decision was based on a consideration of the relevant factors. . . .” *See also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (the function of a reviewing court “is to assure that the agency has given reasoned consideration to all the material facts and issues”).

⁴ Opposition at 2

⁵ *See* Amendment of Section 73.622(b), Table of Allotments Digital Television Broadcast Stations (Ontario, California), *Report and Order*, 17 FCC Rcd 14330 (2002).

little question that the Commission is free to impose conditions on the WINK-DT channel change, if it so wishes.’

FMBC further argues that even if the Commission has such discretion, it still is entitled to unconditional grant because no similar conditions ever have been placed on proposals satisfying computer interference predictions. FMBC disregards, however, that the Commission fully expected the DTV transition to be a “dynamic process” and from the first stages called on broadcasters who developed alternative allotments to work with affected parties and “accommodate the inevitable changes” expected during the transition.’ Consistent with this, Cox requested conditional grant so that if actual interference levels exceeded those predicted, as has occurred in other markets,’ FMBC would undertake corrective measures. If interference levels are as predicted, then any such condition would be inconsequential. In the dynamic environment of digital television, Cox believes the Commission must be allowed reasonable flexibility to respond to new digital developments and protect viewers from harmful interference.

FMBC’s last claim that concern about post-transition harm is speculative and irrelevant” cannot be supported. Cox asked that, given the impact on WFTV’s expected digital use of its traditional Channel 9, grant of the WINK-DT channel change should be conditioned upon the surrender of their DTV channel at the end of the transition. The Commission now has proposed

(’See Amendment of Section 73.622(b), Table of Allotments Digital Television Broadcast Stations (Avalon, California), *Report and Order*, 17 FCC Rcd 17126 (2002). Indeed, if the Commission will condition amendments to the DTV Table to protect foreign viewers from interference, it would be reasonable to extend similar protection to viewers in this country.

’Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report and Order*, 12 FCC Rcd. 14588, ¶ 182 (1997).

⁸ See *Petition* at 2. WBOC-TV (Salisbury, Maryland) and KSPX(TV) (Sacramento, California) are two examples of stations now struggling with harmful interference from new DTV stations at levels that far exceed those predicted.

⁹ See *Opposition* at 2.

to allow stations to swap their analog and digital channels prior to the end of the DTV transition.¹⁰ Accordingly, Cox's concerns about digital operation on its traditional channel, and, more importantly, interference to WFTV's viewers, are very real and immediate.

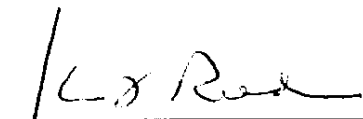
CONCLUSION

THEREFORE, given the likelihood that the operation of WTNK-DT on Channel 9 will result in excessive interference to viewers of WFTV(TV), as well as have a preclusive effect on WFTV's broadcasting capabilities after the DTV transition, Cox requests that the Commission reconsider elements of its unconditional channel change grant. FMBC has failed to demonstrate that conditions on the grant are unwarranted, and in a world where FMBC has no obligation to demonstrate the unavailability of more efficient alternative channels, such conditions are entirely reasonable. Accordingly, the Commission should address Cox's requests for conditions on the WINK-DT authorization with particularity and protect viewers of existing analog service from unnecessary interference

Respectfully submitted,

COX BROADCASTING, INC.

By:



Kevin F. Reed
Scott S. Patrick

Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, DC 20036
(202) 776-2000

Dated: March 12, 2003

¹⁰ Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Notice of Proposed Rulemaking*, MM Docket No. 03-15, ¶ 28 (rel. Jan. 27, 2003).

CERTIFICATE OF SERVICE

I, Ruby Brown, a secretary at the law ~~firm~~ of Dow, Lohnes & Albertson, PLLC do hereby certify that on this 12th day of March, 2003, the foregoing "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION OF COX BROADCASTING, INC." was served via first class mail (except where hand delivery is noted by an asterisk) to the following:

Joseph A. Belisle
Leibowitz & Associates, P.A.
One **SE** 3rd Avenue, Suite 1450
Miami, Florida 33131
(*Fort Myers Broadcasting Company*)

Jonathan D. Blake, **Esq.**
Jennifer Johnson, Esq.
Covington & Burling
1201 Pennsylvania Ave., NW
Washington, DC 20004
(*Post-Newsweek Stations Florida, Inc.*)

John K. Feore, Jr. *
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., NW
Suite 800
Washington, DC 20036
(*Media General Communications, Inc.*)

Dennis F. Kelly, Esq.
P.O. Box 6648
Annapolis, MD 21401
(*Caloosa Television Corporation*)

Ruby Brown